In the Supreme Court of the United States

OCTOBER TERM, 1968

LOUIS S. NELSON, Warden, San Quentin Prison; and Warden of North Carolina State Prison,

Petitioners,

vs.

JOHN EDWARD GEORGE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner Louis S. Nelson, Warden, San Quentin Prison, State of California, appellee below, respectfully petitions that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision of that Court entered on May 9, 1969 reversing and remanding the order of the United States District Court.

OPINIONS BELOW

The opinion of the Court of Appeals is as yet unreported and is appended hereto as Appendix A. The opinions of the United States District Court for the Northern District of California are unreported and are appended hereto as Appendices B, C and D.

JURISDICTION

On May 9, 1969, the United States Court of Appeals for the Ninth Circuit reversed the order of the United States District Court for the Northern District of California dismissing John Edward George's petition for writ of habeas corpus. A timely petition for rehearing was filed and was denied on June 18, 1969. The jurisdiction of this Court is invoked under Title 28, United States Code section 1254(1).

QUESTIONS PRESENTED

1. Whether the Warden of a California state prison is a proper party respondent in a federal habeas corpus proceeding in which a state prisoner serving only a California sentence seeks to collaterally attack a future consecutive North Carolina sentence which has been given no effect in California; and, if not, whether the mere filing of a detainer by North Carolina requires a different result.

2. Whether the Court of Appeals correctly determined that the District Court for the Northern District of California had jurisdiction to inquire into the validity of the North Carolina conviction.

STATUTE INVOLVED

This case involves interpretation of the federal Habeas Corpus Act, Title 28, United States Code sections 2241-2255.

STATEMENT OF THE CASE

INTRODUCTION

This case arises in the aftermath of this Court's decision in *Peyton v. Rowe,* 391 U.S. 54 (1968) overruling *McNally v. Hill,* 293 U.S. 131 (1934) and holding that a state prisoner serving consecutive sentences is "in custody" under Title 28, United States Code section 2241(c)(3). In *Peyton*

v. Rowe, supra, the consecutive sentences were imposed by the same state. The questions posed by this case arise because the consecutive sentences have been imposed by separate sovereign states. Recently these questions have been answered in conflicting fashion by three courts of appeals —by the United States Court of Appeals for the Ninth Circuit in this case; by the United States Court of Appeals for the Fourth Circuit in *Word v. North Carolina,* 406 F.2d 352 (4th Cir. 1969); and by the Third Circuit Court in *Van Scoten v. Commonwealth of Pennsylvania,* 404 F.2d 767 (3d Cir. 1968). The questions raised pose important practical and legal problems to all concerned.

The facts and proceedings with respect to this case are as follows:

A. Proceedings in the State Courts.

On April 27, 1964, John Edward George, the petitioner for writ of habeas corpus below, and respondent in this Court, was convicted in the San Francisco Superior Court of a violation of California Penal Code section 211 (robbery in the first degree). *People v. John Edward George,* No. 62815. He was sentenced to state prison for the term prescribed by law. Under California Penal Code section 213 the sentence imposed by law is an indeterminate five years to life sentence.

Following his conviction detainers were filed in California by the states of Kansas, Nevada, and North Carolina on June 4, 10 and 11, 1964, respectively. (Summary of Sentence Data, Exhibit B of petitioner's "Opposition to 'Motion to Remand to District Court' and Motion to Dismiss Appeal," filed below.)

Thereafter, on or about July 20, 1966, pursuant to California Penal Code section 1389 "The Agreement on Detainers" and at his request, George was released to North

Carolina to stand trial in that state upon a North Carolina robbery charge which underlay the detainer (CT 17).[1] Following his conviction in North Carolina, which was affirmed by the North Carolina Supreme Court in *State v. George,* 271 N.C. 438, 156 S.E.2d 845 (1967), and from which certiorari in this Court apparently was not sought, George was returned to California to complete his California sentence. As George alleged below, service on his North Carolina sentence will not begin until he returns to North Carolina (CT 40-41).

B. Proceedings in the Federal Courts.

1. PROCEEDINGS IN THE DISTRICT COURT.

On December 7, 1967, George filed a petition for writ of habeas corpus in the United States District Court, Northern District of California, in an action entitled "John Edward George v. State of North Carolina" in which he challenged only his North Carolina conviction (CT 1-13). On January 10, 1968, the District Court denied the petition with leave to amend on the ground that George had failed to name a proper party respondent (CT 14, Appendix B).

Thereafter, on February 26, 1968, George amended his petition and in an action entitled "John Edward George v. L. S. Nelson, Warden, San Quentin State Prison (in the capacity as Agent for State of North Carolina) and Warden, North Carolina State Prison (Name Unknown)" again brought suit in the District Court challenging his North Carolina conviction (CT 15-37). He alleged that he was not tried in North Carolina within the period of time permissible under the Agreement on Detainers. Accordingly, he urged that the North Carolina court

1. References are to the Clerk's Transcript on Appeal from the order of the District Court.

was without jurisdiction to proceed, and that he was denied his constitutional right to a speedy trial in North Carolina. He also alleged that he was convicted on the basis of known perjured testimony.[2] On March 1, 1968, the Court again denied the petition on the ground that in the absence of a specific allegation, it was assumed that George was serving concurrent sentences on the California and North Carolina convictions. Since George would not be entitled to release even if his North Carolina conviction was held to be illegal, the Court held that *McNally v. Hill,* 293 U.S. 131 (1934) required denial of the petition (CT 38-39).

On March 15, 1968, George filed a petition for rehearing on the ground that commencement of service on the North Carolina sentence would not begin until he was in "actual custody" of the North Carolina Prison authorities, that the effect of the North Carolina sentence was therefore consecutive, and that *McNally v. Hill, supra,* did not apply (CT 40-42).

On March 21, 1968, however, the District Court denied the motion for rehearing, holding that the "*McNally* rule is equally applicable to the situation when the sentence imposed pursuant to the conviction under attack is to be served after, rather than concurrently, with the valid sentence." (CT 43-44).

On April 25, 1968, the Court ordered that the motion for certificate of probable cause be granted (CT 47).

2. PROCEEDINGS IN THE COURT OF APPEALS.

On or about June 20, 1968, and prior to the filing of an opening brief in the Court of Appeals, George filed a motion

2. The Ninth Circuit noted, *infra,* that George alleged that he presented the first two of these grounds for relief (lack of jurisdiction and denial of right to speedy trial) in his direct appeal in North Carolina. He did not allege in his application that he presented the perjury ground in any North Carolina state court proceeding.

to remand the proceedings for further consideration on the ground that *Peyton v. Rowe, supra,* had since been decided overruling *McNally v. Hill, supra,* and had held that a prisoner serving consecutive sentences is "in custody" under Title 28, United States Code section 2241(c)(3). Accordingly, he argued that *Peyton v. Rowe, supra,* required that his case be remanded to the District Court in order to have the merits of his alleged federal claims adjudicated.

Following an order dated June 12, 1968, by the United States Court of Appeals for the Ninth Circuit setting the date of July 1, 1968, for the submission of the motion, the named-respondent below, Warden Nelson of San Quentin Prison, filed an "Opposition to 'Motion to Remand District Court' and Motion to Dismiss Appeal." He urged that the appeal should be dismissed because: (1) the warden was not a properly named party respondent in an action seeking to set aside a North Carolina conviction which had not been given any effect in California, and (2) the District Court for the Northern District of California was without jurisdiction to inquire into the validity of the North Carolina conviction. This was the first pleading filed by the petitioner Nelson.

After a closing brief was filed by George on or about July 22, 1969, the Court of Appeals by order dated July 12, 1968, passed the matter to a hearing on the merits. Petitioner Nelson filed an Answering Brief, and after the appointment of counsel for George a "Petitioner-Appellant's Reply Brief" was filed by counsel on his behalf, urging that Warden Nelson was a proper party respondent by which to attack the North Carolina conviction and that the California District Court had jurisdiction to inquire into the validity of the conviction.

Oral argument was held on February 28, 1968. At the argument counsel for petitioner attempted to show the cur-

rent status with respect to the detainers filed by Kansas and Nevada (*supra*, 3), and that, according to California practice, detainers were honored in the order received. The Court stated it would consider these matters only if counsel for respondent George so stipulated. He did not.

Thereafter, the Ninth Circuit Court on May 9, 1969 issued its opinion reversing the District Court and remanding the case to the District Court for further proceedings. In reaching that decision the Court held, *inter alia*, that the California warden was a proper respondent since "[h]e is the actual custodian of George by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina conviction he can call upon the authorities of North Carolina to provide that defense." In also holding that the California district court as the district of confinement was the proper court in which to bring an action of this kind, the Court frankly recognized that its decision was directly contrary to a recent decision rendered by the Fourth Circuit in *Word v. North Carolina*, 406 F.2d 352 (1969). In that case the Court had held that the district of sentencing rather than the district of confinement was the proper jurisdictional court in which to bring suit. Following the issuance of the Ninth Circuit decision a timely petition for rehearing and suggestion for rehearing en banc was filed by petitioner. That petition was denied on June 18, 1968.

REASONS FOR GRANTING THE WRIT

There are many important legal and practical reasons for granting this petition for writ of certiorari. First, issuance of the writ is necessary to resolve a conflict among the circuit courts. Thus, as indicated above, the decision of

the Ninth Circuit Court holding that the place of confinement is the proper district in which to bring a habeas proceeding in a case of this kind is contrary to the Fourth Circuit decision in *Word v. North Carolina, supra,* holding that the district of sentencing is the proper jurisdictional district. In *Word* the Fourth Circuit held that Virginia state prisoners challenging future consecutive North Carolina sentences could seek habeas corpus relief in a North Carolina federal district court. We believe that neither decision is compelled by *Peyton v. Rowe, supra.*

Word is contrary to *Van Scoten v. Pennsylvania, supra,* recently decided by the Third Circuit holding that a New Jersey state prisoner could not challenge a future Pennsylvania state sentence in a Pennsylvania district court. In *Van Scoten,* however, the court did not consider the further question raised here of whether the prisoner could sue in the district of confinement. Lower federal court decisions can only reflect this conflict among the circuits.[3] There are important questions of comity and federal-state relationships to be resolved by this case.

Similarly, in addition to the purely legal implications raised by this case the practical implications raised are very important. Clearly, the warden of a California state prison is not equipped to defend a North Carolina conviction. He is not an agent for any other state. On the other

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3. See, *e.g.*, the unreported decision in the consolidated cases of *Lowrie v. California Adult Authority, et al.*, Civil No. 1425L and *Eskew v. State of California,* Civil No. 1451L (C.D. Neb. 1968), holding that a Nebraska district court is powerless to act with respect to a detainer filed by California authorities and that the effect of the detainer, if any, upon incarceration does not raise a federal question; but see *Sloupe v. Peyton,* 290 F.Supp. 741 (E.D. Vir. 1960) holding that an allegation that a Maryland detainer reduced the possibility of Virginia parole and thereby lengthened delay in a Maryland trial thus denying a right to speedy trial, raised a federal question in a Virginia district court.

hand jurisdiction has not been obtained over North Carolina officials and there is no assurance that officials of North Carolina or any other state would voluntarily submit to the jurisdiction of a district court sitting in another state. Should they not voluntarily consent to suit in another jurisdiction it is highly questionable whether any judgment imposed upon any other state official would have any binding effect upon them in another jurisdiction. Assuming *arguendo,* however, that counsel for North Carolina would defend an action in California, the burden of having to transport court records and/or witnesses to California when necessary is clear, even assuming that it would be practically possible to do so. The contrary solution reached by the Fourth Circuit in the *Word* decision poses equally grave, legal and practical problems.

Certainly the decision of this Court in *Peyton v. Rowe, supra,* does not require the outcome demanded by the Ninth Circuit or the contrary result reached by the Fourth Circuit. The important questions of comity and federal-state relationships raised by this case can only be resolved by this Court.

ARGUMENT

I. Since the Warden of San Quentin Prison Is Not an Agent for North Carolina and the District Court Does Not Otherwise Have Jurisdiction It Was Error for the Ninth Circuit to Hold That the California District Court Had Jurisdiction to Review the North Carolina Conviction.

The Ninth Circuit held that the Warden of San Quentin Prison was an agent for the State of North Carolina because that state had filed a detainer in California. Accordingly, the Court held that Warden Nelson was a proper party respondent in this habeas corpus proceeding and that the District Court of Northern California accordingly had

jurisdiction to review the North Carolina judgment. In our opinion this decision is wrong and *Peyton v. Rowe, supra,* does not compel that result.

A. THE WARDEN OF SAN QUENTIN PRISON IS NOT A PROPER PARTY RESPONDENT IN A HABEAS CORPUS PROCEEDING BROUGHT BY A CALIFORNIA STATE PRISONER SEEKING TO COLLATERALLY ATTACK A SISTER-STATE CONVICTION WHICH HAS NOT BEEN GIVEN EFFECT IN CALIFORNIA; AND THE MERE FILING OF A DETAINER BY THE SISTER-STATE DOES NOT MAKE THE WARDEN OF SAN QUENTIN AN AGENT FOR THAT PURPOSE.

In *Peyton v. Rowe,* 391 U.S. 54 (1968) this Court overruled *McNally v. Hill, supra,* and held that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of Title 28, United States Code section 2241(c)(3). Accordingly, it was held that a state prisoner could challenge the constitutionality of a sentence to be served in the future in a federal habeas corpus proceeding.

In *Peyton v. Rowe, supra,* however, the consecutive sentences were imposed by one sovereign state for crimes committed within that state. Here the consecutive sentences have been imposed by separate sovereign states for separate criminal acts. Neither state has given effect to the conviction rendered by the other. We think that this case therefore is entirely different from that presented by *Peyton v. Rowe,* and that under our federal system *Peyton v. Rowe* is inapplicable.

Nevertheless, the Ninth Circuit found *Peyton v. Rowe, supra,* to be applicable in a case such as this and in reaching that decision found the Warden of San Quentin Prison to be a proper party respondent for the purpose of challenging the sister-state conviction. The Court reached that conclusion on the theory that Warden Nelson was an agent for North Carolina because that state had filed a detainer in California.

Thus, the Court held that:

> "It is also our view that, while the challenged judgment is that of North Carolina, the California warden is a proper respondent. He is the actual custodian by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina conviction he can call upon the authorities of North Carolina to provide that defense."

The conclusion that Warden Nelson is an agent for North Carolina and therefore a proper party to be named in this action is not supported in fact or law.

Thus, it is clear that George is presently in custody at San Quentin Prison solely as the result of his California conviction. His North Carolina sentence will not begin to run until he is in the actual custody of the North Carolina authorities. Under California Penal Code section 1389, et seq., the State of California at George's request relinquished control and custody of George in order to permit him to stand trial in North Carolina. However, when George was received back into custody by the California authorities no custodial obligations were assumed by California on behalf of North Carolina.

It has long been held that the custodian of the petitioner is an indispensable party in an application for federal habeas corpus brought pursuant to the provisions of Title 28, United States Code section 2241, et seq. The rationale behind this requirement is a necessity that the Court gain jurisdiction over the person of one empowered to deliver the body of the petitioner if the custody should be declared illegal. *King v. State of California*, 356 F.2d 950 (9th Cir. 1966); *Morehead v. State of California*, 339 F.2d 170 (9th Cir. 1964); *Roseborough v. State of California*, 322 F.2d

788 (9th Cir. 1963); *Bohm v. State of Alaska,* 320 F.2d 851 (9th Cir. 1963). This rule is well-founded within the context of the previous rule of *McNally v. Hill, supra,* and within the specific factual circumstances of *Peyton v. Rowe, supra,* where one state has imposed all sentences for the crimes involved. However, a custodian for purposes of one State's judgment is not a custodian for another under our federal system. There is nothing in *Peyton* which is addressed to the problem here presented where separate convictions are imposed by separate sovereignities for separate criminal acts. That decision does not suggest the result reached here or in *Word.* Indeed, what the Court did indicate is to the contrary. Thus, in justifying *Peyton* it said:

> "Meaningful factual hearings on alleged constitutional deprivations can be conducted before memories and records grow stale, *and at least one class of prisoners* [emphasis supplied] will have the opportunity to challenge defective convictions and obtain relief without having to spend unwarranted months or years in prison." *Peyton v. Rowe, supra,* 65.

There is no action which Warden Nelson can take which will affect the North Carolina conviction. Similarly, this is not a case where California has given some effect to the conviction as, for example, by increasing punishment or by rendering habitual criminal status applicable because of the other conviction. Thus, cases like *United States ex rel. Durocher v. LaVallee,* 330 F.2d 303, 306 (2d Cir. 1964), *cert. denied,* 377 U.S. 998 (1964) which have permitted attack against a sister-state conviction in such circumstances, are inapplicable.

Similarly, the mere filing of a detainer cannot render the Warden of San Quentin Prison an agent for a sister-state. An interstate detainer is a request, in the form of a war-

rant, complaint, or hold order, notifying the incarcerating state that the prisoner is wanted in another jurisdiction and requesting that the demanding state be notified of the prisoner's availability for custody. It may be filed either as a result of a conviction or as a result of an untried charge. California follows the practice of honoring detainers it deems valid in the order filed, and when a detainer is exercised custody of the prisoner may be obtained either through formal extradition proceedings or by waiver of the prisoner. In a case like the present one where the prisoner has requested to be released to another jurisdiction for trial, in accordance with the Agreement on Detainers, extradition is deemed waived. See California Penal Code section 1349 (Art. III, (e)).

Indeed, the questionable soundness of designating Warden Nelson an agent for North Carolina because a detainer has been filed, is currently demonstrated by a case now pending in the United States District Court for the Northern District of California, *John Edward George v. Louis S. Nelson, Warden, San Quentin State Prison and State of Kansas, Donald Foster, Agent for Same,* Case No. 51720. The Supreme Court may take judicial notice of cases pending in lower federal courts. *Brown v. Board of Education of Topeka,* 344 U.S. 1 (1952).

In the district court case George has filed a habeas corpus petition seeking to set aside the Kansas detainer based upon an untried robbery charge on the ground that he has been denied a right to speedy trial in Kansas. Kansas is not a party to the Interstate Agreement on Detainers, whereas North Carolina is. While the Kansas detainer is based upon an untried robbery charge and the North Carolina detainer is based upon a conviction, both detainers notify California

that George is wanted in another jurisdiction and request notification of his availability for custody.

A show cause order now has been issued by the district court. In view of Kansas' detainer the effect of the Ninth Circuit decision may be to constitute Warden Nelson not only an agent for North Carolina, but also, perhaps, to make him an agent for Kansas. Neither result is required by *Peyton v. Rowe, supra,* or any extension of that decision.

B. THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA IS OTHERWISE WITHOUT JURISDICTION TO REVIEW THE NORTH CAROLINA CONVICTION.

Title 28, United States Code section 2241 provides, *inter alia,* that the District Court may issue a writ of habeas corpus only within its respective jurisdiction. Accordingly, this Court has held that the petitioner must be in custody within the jurisdiction of the court in order for the jurisdiction of the court to attach and for relief to be granted. *Ahrens v. Clark,* 335 U.S. 188 (1948); *Ex parte Endo,* 323 U.S. 283 (1944). To the extent the Court of Appeals held that petitioner could not have brought suit in North Carolina, the decision in this case is consonant with Supreme Court law. *See also Van Scoten v. Commonwealth of Pennsylvania,* 404 F.2d 767 (3rd Cir. 1968). *Word v. North Carolina, supra,* is not.

However, as set forth above, George is not in actual or constructive custody in California because of the North Carolina judgment and Warden Nelson is not an appropriate party respondent. A North Carolina official who can defend that state's conviction is an indispensable party and such an official has not been brought before the California court. This Court has clearly indicated that the Great Writ cannot be issued outside the territorial confines of the district court. See, *e.g., Carbo v. United States,* 364 U.S. 611,

618 (1961) differentiating between a writ of habeas corpus *ad prosequendum* and the Great Writ. The District Court therefore does not have jurisdiction to proceed in this matter.

The filing of a detainer similarly cannot change that conclusion. In this connection this Court's decision in *Sweeney v. Woodall,* 344 U.S. 86 (1952), involving extradition, is analogous to and controlling of the proposition that attack may not be made of an underlying conviction of a sister state when attacking either an extradition warrant or detainer. In the *Sweeney* decision an Alabama fugitive from prison sought to prevent his rendition to Alabama by bringing a petition for writ of habeas corpus in the asylum state of Ohio. The respondent charged that during his confinement in Alabama he had been brutally mistreated, and that he would be subjected to such mistreatment and worse if returned to Alabama. In its decision, the Supreme Court stated that the question to be decided was as follows:

> "In the present case, as in the others, a fugitive from justice has asked the federal court in his asylum state to pass upon the constitutionality of his incarceration in the demanding state, although the demanding state is not a party before the federal court and although he has made no attempt to raise such a question in the demanding state. The question is whether, under these circumstances, the district court should entertain the fugitive's application on its merits." *Sweeney v. Woodall, supra,* at 88-89.

In thereafter holding that the respondent was not entitled to relief, the Court stated:

> "Respondent makes no showing that relief is unavailable to him in the courts of Alabama. Had he never eluded the custody of his former jailers he certainly would be entitled to no privilege permitting him to

attack Alabama's penal process by an action brought outside the territorial confines of Alabama in a forum where there would be no one to appear and answer for that State. Indeed, as a prisoner of Alabama, under the provisions of 28 U.S.C. § 2254, and under the doctrine of *Ex parte Hawk, supra,* he would have been required to exhaust all available remedies in the state courts before making any application to the federal courts sitting in Alabama.

"By resort to a form of 'self help,' respondent has changed his status from that of a prisoner of Alabama to that of a fugitive from Alabama. But this should not effect the authority of the Alabama courts to determine the validity of his imprisonment in Alabama. The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the claimed abuses of its prison system. Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned." *Sweeney v. Woodall, supra,* 89-90.

Similar considerations of comity and practicality prevail here. Thus, to date North Carolina is not a party to this litigation. Its officials are not within the jurisdiction of the Court and it is highly questionable whether any judgment rendered in California would be binding upon them. Cer-

tainly traditional rules of exhaustion cannot be applied by a decision such as that rendered in the Ninth Circuit in the present case.

Moreover, assuming *arguendo* that a member of the North Carolina Attorney General's staff would voluntarily defend the North Carolina judgment in California, the burden of having to transport court records and/or evidentiary witnesses across country is clear even assuming that it would be practically possible to do so. Transfer to North Carolina pursuant to Title 28, United States Code section 1404(a) is highly questionable, if for no other reason than that statute clearly provides that a civil action may be transferred to "any other district or division where it might have been brought." While the *Word* case alone holds that George might have brought suit in North Carolina that decision itself clearly raises grave legal and practical problems.

CONCLUSION

The opinion of the Court of Appeals in this case places an intolerable burden on the Warden of San Quentin Prison in that it requires him to act as agent for other states to defend convictions in which he has no interest. He is not a proper party respondent and the District Court of California does not have jurisdiction over the North Carolina authorities. Accordingly, there is no way in which the Northern District Court of California can give effect to any order which it might issue.

The decision of *Peyton v. Rowe,* does not require the outcome decided by the Ninth Circuit in this case, nor, indeed, does it require the outcome of the decision rendered by the Fourth Circuit in *Word.* Because this case represents a significant issue in the procedure and jurisdiction of habeas

corpus cases, and involves both state and federal prisoners, we respectfully urge that the writ of certiorari be granted.

Dated September 12, 1969.

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(Appendices Follow)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,851

JOHN EDWARD GEORGE,
Appellant,

vs.

LEWIS S. NELSON, Warden, California State Prison, San Quentin; and Warden of North Carolina State Prison,
Appellees.

[May 9, 1969]

Appeal from the United States District Court for the Northern District of California

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Before: Hamley, Hamlin and Koelsch, Circuit Judges

Hamley, Circuit Judge:

John Edward George, in custody at California State Prison, San Quentin, appeals from a district court order denying his application for a writ of habeas corpus.

On April 27, 1964, George was convicted in a California state court, on a plea of guilty, of robbery in the first degree and began serving his sentence of five years to life at San Quentin. On July 20, 1966, George was released to North Carolina authorities to stand trial in that state upon a North Carolina robbery charge. This was done pursuant to California Penal Code section 1389 (1963), and North Carolina G.S. § 148-89, known as the interstate "Agreement on Detainers."

George was tried in Gaston County, North Carolina, on February 8, 1967, and was convicted on the North Carolina

charge. He was sentenced to imprisonment for from twelve to fifteen years. The conviction was thereafter affirmed. *State v. George,* 271 N.C. 438, 156 S.E. 2d 845.

However, George did not begin service of the North Carolina sentence. He was returned to San Quentin to complete service of his California sentence after which he is to serve his North Carolina sentence. On April 14, 1967, North Carolina authorities wrote to San Quentin, placing a detainer on George so that he would in due course be returned to North Carolina for this purpose.

In his habeas corpus application thereafter filed in the United States District Court for the Northern District of California, George did not attack his California conviction, but rather challenged the North Carolina conviction. He alleged, in effect, that: (1) in the North Carolina prosecution he was not tried within the period permissible under the California and North Carolina detainer statutes, and the North Carolina court was therefore without jurisdiction, this constituting a denial of due process; (2) he was denied his constitutional right to a speedy trial in North Carolina; and (3) he was convicted on testimony known by North Carolina prosecuting officials to be perjured.[1] George asserted in his application that he wanted the validity of the North Carolina conviction determined now because it, together with the North Carolina detainer, adversely affects favorable consideration of parole and reduced custodial classification by California authorities.

On March 1 and 20, 1968, the district court denied the application for a writ on the ground that *McNally v. Hill,* 293 U.S. 131, foreclosed habeas corpus relief on the North Caro-

1. George alleged that he presented the first two of these grounds for relief in his direct appeal in North Carolina. He did not allege in his application that he presented the perjury ground in any North Carolina state court proceeding.

lina conviction while George was still in custody under the prior California judgment. George appealed to this court on April 3, 1968.

On May 20, 1968, the United States Supreme Court in *Peyton v. Rowe*, 391 U.S. 54, overruled *McNally v. Hill*. The Supreme Court held that a prisoner serving consecutive sentences is "in custody" under any one of them for purposes of 28 U.S.C. § 2241(c)(3) (1964), and may, in a federal habeas corpus proceeding thereunder, challenge the constitutionality of a sentence scheduled for future service.

George then moved in this court for an order remanding the cause to the district court for further proceedings in the light of *Peyton v. Rowe*. In a supplemental brief thereafter filed George in effect asserted, as an additional reason why the validity of the North Carolina conviction should be determined at this time, that a delay in making this determination will lessen the chance that substantial justice will be done with regard to the North Carolina conviction.[2]

The California warden opposed the motion to remand, arguing that he is not a proper party insofar as George is challenging the North Carolina conviction, and that an appropriate North Carolina party is an indispensable party.[3] The California warden further argued that the United States District Court for the Northern District of California did not have jurisdiction to entertain this habeas proceeding. We passed consideration of the motion to the hearing of the appeal on the merits.

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2. George thereby invoked the reasons stated in *Peyton v. Rowe*, 391 U.S. 54, 62, 64 (the dimming of memories, death of witnesses, and incarceration when entitled to release) why habeas applicants are entitled to attack all outstanding convictions without delay.

3. While George named the "Warden, North Carolina State Prison (Name Unknown)" as a respondent in his amended application in this habeas corpus proceeding, there is nothing in the record before us to indicate that process has been served upon the North Carolina warden.

In *Peyton v. Rowe,* the consecutive or successive sentences were imposed by the same sovereign. Here the first sentence was imposed against George by a California court, and the second was imposed by a North Carolina court. However, the rule established in *Rowe* that a federal habeas applicant may attack the validity of a second sentence without awaiting completion of service of the first sentence, applies even though the two sentences were imposed by different sovereigns. *Word v. North Carolina,* 4 Cir., 406 F.2d 352, 355; *United States ex rel. Van Scoten v. Commonwealth of Pennsylvania,* 3 Cir., 404 F.2d 767, 768.

This brings us to the question of whether, under the circumstances of this case, a habeas proceeding should be entertained in the district of confinement (California) or in the district of sentencing (North Carolina).

Since George is in state custody in the Northern District of California, we think that district court has jurisdiction to entertain the habeas application. Title 28 U.S.C. § 2241(a) provides that writs of habeas corpus may be granted by the district courts "within their respective jurisdictions." In *Ahrens v. Clark,* 335 U.S. 188, the Supreme Court held that this phrase means the district in which the petitioner is detained or confined when the petition is filed.[4] See also, *Ashley v. Washington,* 9 Cir., 394 F.2d 125, 126.

It is also our view that, while the challenged judgment is that of North Carolina, the California warden is a proper respondent. He is the actual custodian of George by reason of the California conviction and also as agent of the North Carolina warden, as evidenced by the detainer. If the California warden does not wish to defend the North Carolina

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4. As observed by the Fourth Circuit in *Word v. North Carolina,* 406 F.2d 352, this rule of *Ahrens* has been departed from in the case of applicants resident outside of the United States, and perhaps in certain other exceptional circumstances.

conviction he can call upon the authorities of North Carolina to provide that defense.

In holding that the California district court has jurisdiction, we have not overlooked the fact that the Fourth Circuit, in *Word v. North Carolina*, 4 Cir., 406 F.2d 352, has reached a contrary result. The *Word* court affirmed the dismissal of two habeas applications filed in a Virginia district court by Virginia prisoners challenging North Carolina convictions. In doing so, however, the Fourth Circuit did not seem to announce a categorical rule that a district court in the district of custody could never assume jurisdiction. Instead, it said ". . . . the latter, where permissible [is] infrequently preferable."

We recognize that, under the law of the Fourth Circuit, as established in the *Word* decision, a federal district court in North Carolina could have entertained George's application. It was there held that a North Carolina district court should not have dismissed, on jurisdictional grounds, the habeas application of a Virginia prisoner who sought to set aside a North Carolina conviction.[5] But the problem before us is not whether a district court in North Carolina could have entertained George's application, but whether the district court in California, where the application was filed, had jurisdiction. We do not now pass upon the question of whether the California district court may, after this remand, transfer the cause to the North Carolina district court pursuant to 28 U.S.C. § 1404(a) (1964).

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5. The rule is to the contrary in the Ninth Circuit. In *Ashley v. Washington*, 9 Cir., 394 F.2d 125, this court held that a state prisoner in Florida custody under a Florida judgment, faced with a detainer filed by the State of Washington, could not challenge the Washington conviction upon which the detainer was based, in a habeas proceeding brought in a Washington district court. To like effect, see *Van Scoten v. Commonwealth of Pennsylvania*, 3 Cir., 404 F.2d 767.

It cannot be denied that the entertaining of such proceedings in the state of confinement rather than the state where the challenged conviction was obtained presents practical problems. But, likewise, a rule requiring the prisoner to seek relief in the latter state presents practical problems. They are discussed at some length in the opinions filed in *Word v. North Carolina*. We do not see how a disposition of this appeal can avoid one set of problems or the other. Perhaps new judicially or legislatively-fashioned techniques are needed to meet these problems, now that *Peyton v. Rowe* has assured state prisoners an immediate right to attack convictions not yet being served. But all that is presented to us at this time are the questions of California district court jurisdiction and indispensability of parties.

Reversed and remanded for further proceedings.

Appendix B

Filed—Jan. 10, 1968
James P. Welsh, Clerk

In the United States District Court
Northern District of California

No. 48344

JOHN EDWARD GEORGE,
Petitioner,

vs.

STATE OF NORTH CAROLINA,
Respondent.

ORDER

Petitioner, an inmate at San Quentin Prison, has filed this petition for writ of habeas corpus attacking his conviction by the State of North Carolina.

From the face of the petition it is apparent that the petitioner has failed to name the proper party respondent as required by 28 U.S.C. § 2242, for the person in whose custody he is confined is not designated. See *Mihailoviki v. State of California,* 364 F.2d 808 (9th Cir. 1966); *Morehead v. State of California,* 339 F.2d 170 (9th Cir. 1964).

Accordingly, this petition for writ of habeas corpus is DENIED, with leave to amend by naming the proper party respondent.

Dated: January 10, 1968.

/s/ GEO. B. HARRIS
United States District Judge

Appendix C

Filed—Mar. 1, 1968
James P. Welsh, Clerk

In the United States District Court
Northern District of California

No. 48344

JOHN EDWARD GEORGE,
Petitioner,

vs.

L. S. NELSON, Warden, San Quentin Prison,
Respondent.

ORDER

By order of this Court dated January 10, 1968, petitioner's application for writ of habeas corpus was denied for failure to name the proper party respondent. This deficiency has now been corrected.

Petitioner, while imprisoned at San Quentin Prison pursuant to a valid California judgment, was transferred to North Carolina to stand trial on a charge of armed robbery. He was convicted and returned to San Quentin. He now seeks to attack his North Carolina conviction.

Although his petition does not so state, it is assumed that the petitioner is serving concurrent sentences on the California and North Carolina convictions. Thus, he would not be entitled to release from detention, even if his North Carolina conviction were held to be illegal. This is a fatal defect. *McNally v. Hill,* 293 U.S. 131.

Accordingly, this petition for writ of habeas corpus must be, and hereby is, Denied.

Dated: March 1, 1968.

/s/ GEO. B. HARRIS
United States District Judge

Appendix D

Filed—Mar. 21, 1968
James P. Welsh, Clerk

In the United States District Court
Northern District of California

No. 48344

JOHN EDWARD GEORGE,
Petitioner,

vs.

L. S. NELSON, Warden, San Quentin Prison,
Respondent.

ORDER

By order of this Court dated March 1, 1968, petitioner's application for writ of habeas corpus was denied. The Court, relying on *McNally v. Hill,* 293 U.S. 131, held that inquiry into the petitioner's North Carolina conviction was barred because he was concurrently serving a sentence pursuant to a valid California judgment.

Petitioner now seeks a rehearing. He argues that *McNally* is not applicable to his case because he will not begin serving his North Carolina sentence until completion of his California sentence. The *McNally* rule, however, is equally applicable to the situation where the sentence imposed pursuant to the conviction under attack is to be served after, rather than concurrently, with the valid sentence.

Accordingly, this motion for a rehearing must be, and hereby is, denied.

Dated: March 20, 1968.

/s/ GEO. B. HARRIS
United States District Judge

Appendix E

UNITED STATES CODE

Title 28

28 U.S.C. § 1254(1) (1964), 62 Stat. 928 (1948)

§ 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1404(a) (1964), 62 Stat. 937 (1948)

§ 1404. Change of Venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 2241(c)(3) (1964), 63 Stat. 105 (1949)

§ 2241. Power to grant writ.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

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(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

CALIFORNIA PENAL CODE

Chapter 8.5. Agreement on Detainers [New]

§ 1389. Disposal of detainers against prisoner based on untried charges, etc.

The agreement on detainers is hereby enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows:

The Agreement on Detainers.

The contracting states solemnly agree that:

Article I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged

against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also

constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which

the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has

been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is

returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

Article VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Article VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

Article VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

Article IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (Added Stats.1963, c. 2115, p. 4394, § 1.)

§ 1389.1 Appropriate court

The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this State, means the court in which the indictment, information, or complaint is filed. (Added Stats.1963, c. 2115, p. 4394, § 1).

§ 1389.2 Enforcement; co-operation

All courts, departments, agencies, officers, and employees of this State and its political subdivisions are hereby directed to enforce the agreement on detainer and to co-operate with one another and with other states in enforcing the agreement and effectuating its purpose. (Added Stats. 1963, c. 2115, p. 4394, § 1.)

§ 1389.3 Habitual criminals; application of act

Nothing in this chapter or in the agreement on detainers shall be construed to require the application of Section 644 to any person on account of any conviction had in a proceeding brought to final disposition by reason of the use of said agreement. (Added Stats.1963, c. 2115, p. 4394, § 1.)

§ 1389.4 Escapes

Every person who has been imprisoned in a prison or institution in this State and who escapes while in the custody of an officer of this or another state in another state pursuant to the agreement on detainers is deemed to have violated Section 4530 and is punishable as provided therein. (Added Stats.1963, c. 2115, p. 4394, § 1.)

§ 1389.5 Surrender of inmates

It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this State to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainer. Such official shall inform such inmate of his rights provided in paragraph (a) of Article IV of the Agreement on Detainers in Section 1389 of this code. (Added Stats.1963, c. 2115, p. 4394, § 1.)

§ 1389.6 Administration

The Administrator, Interstate Probation and Parole Compacts, shall administer this agreement. (Added Stats.1963, c. 2115, p. 4394, § 1.)

§ 1389.7 Sentence concurrent with that of other jurisdiction; term-fixing and parole functions

When, pursuant to the Agreement on Detainers, a person in actual confinement under sentence of another jurisdiction is brought before a California court and sentenced by the judge to serve a California sentence concurrently with the sentence of the other jurisdiction, the Adult Authority and the California Women's Board of Terms and Parole, and the panels and members thereof, may meet in such other jurisdiction, or enter into cooperative arrangements with corresponding agencies in the other jurisdiction, as necessary to carry out the term-fixing and parole functions. (Added Stats.1963, c. 2115, p. 4394, § 1, as amended Stats. 1965, c. 238, p. 1215, § 1.)